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In the Supreme Court of the United States

MORGAN STANLEY CAPITAL GROUP, INC.,
Petitioner
v.
PUBLIC UTILITY DISTRICT NO. 1 OF SNOHOMISH COUNTY, WASHINGTON, *ET AL.*,
Respondents

CALPINE ENERGY SERVICES, L.P. *ET AL.*,
Petitioners
v.
PUBLIC UTILITY DISTRICT NO. 1 OF SNOHOMISH COUNTY, WASHINGTON, *ET AL.*,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE PUBLIC UTILITY LAW PROJECT OF NEW YORK, INC. IN SUPPORT OF AFFIRMANCE

Gerald A. Norlander
Counsel of Record
PUBLIC UTILITY LAW PROJECT
OF NEW YORK, INC.
194 Washington Avenue, Suite 420
Albany, NY 12210-2314
(518) 449-3375

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INTEREST OF THE AMICUS[1]

The Public Utility Law Project of New York, Inc. ("PULP") is a nonprofit organization formed in 1981 to represent the interests of low and fixed income residential utility consumers in matters affecting affordability, universal service, and consumer protection. In New York, where retail utilities purchase at wholesale most of the electricity transmitted to their customers, residential consumers are adversely affected by the current unfiled market rate regime of the Federal Energy Regulatory Commission ("FERC"). Market-based rates for wholesale electricity demanded by sellers and charged under unfiled market-based rate contracts are being passed through to retail consumers with no effective federal or state protection against excessive wholesale charges, with particular harm to low income consumers. The position urged by FERC and Petitioners undermines the fundamental necessity that all charges established by long-term wholesale electricity contracts must be filed in advance and must

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae*'s intention to file this brief. The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part. No counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. PULP is a petitioner in *Colorado Office of Consumer Counsel v. FERC*, 490 F.3d 954 (C.D. Cir. 2007), *petition for cert. filed*, No. 07-835 (Nov. 19, 2007).

be reviewable by FERC for reasonableness. Their argument, if accepted, would destroy the bond of consumer protection and regulatory agency accountability intended by the Federal Power Act ("FPA"), and would harm retail consumers in New York and throughout the nation.

STATUTORY PROVISIONS INVOLVED

FPA Section 205(d), 16 U.S.C. § 824d(d):

> Notice required for rate changes. Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the sixty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

SUMMARY

This *amicus* brief is respectfully submitted on behalf of the Public Utility Law Project of New York, Inc. urging affirmance of the Ninth Circuit's order, insofar as it holds that "FERC erred . . . in its procedural reliance on *Mobile-Sierra* [,] . . . reliance on *Mobile-Sierra* was misplaced . . ." and requires FERC to determine whether disputed contract rates for wholesale electricity at issue are just and reasonable. *Public Utility District No. 1 of Snohomish County Washington, et al. v. FERC*, 471 F.3d 1053, 1057 (9th Cir. 2006), *cert. granted sub nom., Morgan Stanley Capital Group Inc. v. Public Utility District No. 1 of Snohomish County, Washington*, __ U.S. __, 128 S. Ct. 30 (2007).

The Petitioner utilities and FERC invoke the *Mobile-Sierra* doctrine favoring contract repose, but overlook the critical distinction — that those cases involved contracts filed in compliance with clear requirements of the FPA. This distinction, only touched upon by the parties, is the "elephant in the room," because unfiled contracts are always subject to plenary review by FERC for reasonableness, without regard to the *Mobile-Sierra* doctrine.

We urge the Court to resolve this case in a manner faithful to the plain language of the FPA and in harmony with the statute's primary purpose — the protection of utility consumers. The approach we urge avoids unnecessary reconsideration of the Court's longstanding and definitive decisions interpreting the FPA and parallel provisions of the Natural Gas Act ("NGA"), the pertinent language of which has not changed in the intervening years. We also urge the

Court to follow its precedent established in cases where it thwarted federal regulatory agency attempts, made without statutory authority, to relieve regulated entities of their duties under filed rate regulation statutes in well intentioned but ultimately ineffective efforts to promote competition, markets, and deregulation. *MCI Telecomm. Corp. v. AT&T*, 512 U.S. 218, 230-231 (1995) ("*MCI*").

Resolution of the case in the manner we suggest will enable any unreasonable contract rates to be fixed by FERC as required by the FPA, will encourage sellers to meet their statutory filing obligations in the future, and will channel any impetus for amendment of the current filed rate regulation paradigm to Congress, where it belongs.

ARGUMENT

I. THE *MOBILE-SIERRA* DOCTRINE APPLIES ONLY TO CONTRACTS FILED IN COMPLIANCE WITH THE FPA

Petitioners (wholesale sellers of electricity) principally rely on this Court's decisions in the "*Mobile-Sierra*" cases,[2] the gist of which, they contend, favors repose for all wholesale electricity rates established in long term contracts by setting a very high bar for any revision by FERC of charges made

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[2] *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956) ("*Mobile*") and *Federal Power Comm'n. v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) ("*Sierra*").

under contracts.[3] FERC agreed. *Nevada Power Company, et al. v. Enron Power Marketing Inc., et al.*, Joint Appendix P, p. 1285a.

The Ninth Circuit held that the *Mobile-Sierra* precedents do not insulate sellers with market-based rates from meaningful subsequent review of their contracts (making refunds possible for the eventual benefit of retail consumers). To justify the degree of contract rate repose sought by Petitioners under *Mobile-Sierra*, the Ninth Circuit said, *inter alia*, there must be an opportunity for FERC to conduct an initial review of the contract rate. 471 F.3d at 1080. Where there was no initial review of reasonableness of contract rates, it said, market dysfunction at the time of contract formation should be considered. *Id.* at 1086.

The prospect of a retroactive assessment of market dysfunction triggering revision of long-term contracts now fells forests, to print the claims of sellers and their *amici* that the "integrity" and "sanctity" of their contracts would be violated or even unconstitutionally abridged.[4] These novel claims need

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[3] *See, e.g., Brief for Petitioner Calpine Energy Services, et al.*, at p. 29, ("[T]he *Mobile-Sierra* doctrine has, for the past half-century, provided a high level of certainty that arms-length contracts between sophisticated participants in the electricity supply markets will be honored, absent the most exceptional circumstances.").

[4] "[T]he integrity of contracts [is] essential," *Brief for Petitioner Morgan Stanley Capital Group* at 3; "[T]he sanctity of contracts...," *Brief for Petitioners Calpine Energy Services, et al.* at 16.

not be reached, however, because, as discussed below, a finding of market dysfunction is not a necessary predicate for plenary FERC review to determine if *unfiled* contract rates and charges are reasonable.

The *Mobile-Sierra* doctrine was established a half century ago, when sellers sought to override *filed* contract rates simply by filing new rate schedules with charges higher than those contained in their contracts. The sellers were not allowed to trump their contracts with newly filed rates. Essential to those cases were judicial findings that the contract rates had been *filed* by those sellers, in compliance with the governing statute. This Court in *Mobile* explained:

> This contract *was filed* with the Federal Power Commission as an amendment to the general supply contracts between Mobile and United, *and, with the approval of the Commission, became a part of United's filed schedules of rates and contracts.*
>
> * * * *
>
> The Act requires natural gas companies *to file all rates and contracts* with the Commission and authorizes the Commission to modify any rate or contract which it determines to be "unjust, unreasonable, unduly discriminatory, or preferential."
>
> * * * *
>
> In construing the Act, we should bear in mind that it evinces no purpose to

abrogate private rate contracts as such. To the contrary, *by requiring contracts to be filed* with the Commission, the Act expressly recognizes that rates to particular customers may be set by individual contracts.

* * * *

Recognizing the need these circumstances create for individualized arrangements between natural gas companies and distributors, the Natural Gas Act permits the relations between the parties to be established initially by contract, *the protection of the public interest being afforded by supervision of the individual contracts, which to that end must be filed with the Commission and made public* .

* * * *

The provision of the Natural Gas Act directly in issue here is 4(d), which provides that 'no change shall be made by any natural-gas company in any such [filed] rate . . . or contract . . . except after thirty days' notice to the Commission,' *which notice is to be given by filing new schedules showing the changes and the time they are to go into effect.*

* * * *

These sections are simply parts of a single statutory scheme under which all

> rates are established initially by the natural gas companies, by contract or otherwise, and *all rates are subject to being modified by the Commission* upon a finding that they are unlawful.
>
> * * * *
>
> *The basic duties are the filing requirements*: [the Act] requires schedules showing all rates and contracts in force to be filed with the Commission and 4(d) requires all changes in such schedules likewise to be filed. *In addition, 4(d) imposes the further requirement that the changes be filed at least thirty days before they are to go into effect.* It may readily be seen that these requirements are no more than are necessary to implement 4(e) and 5(a): *the filing requirements are obviously necessary to permit the Commission to exercise its review functions, and the requirement of 30-days' advance notice of changes is essential to afford the Commission a reasonable period in which to determine whether to exercise its suspension powers under 4(e). Mobile*, 350 U.S. at 335, 337, 339, 341-42 (emphasis added) (citations omitted).

Similarly, in *Sierra*, issued the same day as *Mobile*, the electricity contract at issue "*was duly filed with the Federal Power Commission.*" *Sierra*, 350 U.S. at 352

(emphasis added).[5] The only change to the FPA rate and contract filing requirements since *Mobile-Sierra* was enlargement of the advance public notice filing period from thirty to sixty days. Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 49 Stat. 851 (1978).

FERC, the Petitioners, and their *amici* invoking the *Mobile-Sierra* doctrine avoid the obvious — the contracts in *Mobile* and *Sierra* were *publicly filed in advance,* in compliance with the governing statute "directly in issue." The public and the regulator thus had opportunities to react if the contract rates were unreasonable before the charges were imposed. The *Mobile-Sierra* precedents simply have no bearing in this case, where the initial statutory period for public scrutiny and agency review was negated by failure of the sellers to meet their statutory filing duties. The Ninth Circuit as much as says so, but appears to have been constrained by its opinion in *Lockyer, et al. v. FERC, et al.*, 383 F.3d 1006 (9th Cir. 2004), *cert. denied*, 127 S. Ct. 2972 (2007), in which it said FERC could eliminate the utilities' prior filing requirements if they lack market power. This Court, however, is not constrained from finding that the *Mobile-Sierra* doctrine simply cannot be invoked by sellers who failed to file their contracts in compliance with the statute.

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[5] " The pertinent provisions of the Federal Power Act . . . are §§ 205(c), (d), and (e), and 206(a), which are substantially identical to §§ 4(c), (d), and (e), and 5(a), respectively, of the Natural Gas Act." *Sierra*, 350 U.S. at 350 - 351 (footnote omitted).

A. The Contracts At Issue Were Not Publicly Filed In Advance And FERC Issued No Order Under FPA § 205(d) Allowing Any Change In The Filing Date For Good Cause Shown

FPA § 205(d) plainly requires sellers to file *all* rates and contracts sixty days in advance, and requires specific orders, tailored to the situation, to justify any deviations from the sixty day advance notice period:

> Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation *or contract relating thereto, except after sixty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection* new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the sixty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed

> and published. FPA § 205(d), 16 U.S.C.S. § 824d(d) (emphasis added).[6]

FERC's synopsis of the FPA statutory scheme at pages 2 -3 of its brief mentions FPA §§ 205 (a), (b), (c) and (e) but completely omits (d), the provision directly involved in *Mobile-Sierra*. Subdivision (d) is eventually mentioned, at page 31, where FERC acknowledges with candor that it "requires that all rates be filed 60 days before service begins," but contends that its favorable market power assessment "satisfies" the utility's statutory advance filing obligation. Nothing FERC says, however, can alter the duty placed by Congress on the utility.

The Nevada Power Company and Sierra Pacific Power Company (the "Nevada Companies") complaints in the underlying FERC proceeding involved more than two hundred contracts with ten sellers. Nevada Companies contend that these contracts were not filed, nor were they required by FERC to be filed. *Joint Appendix J*, at 1083a, 1085a. Although the record below does not mention whether any of the other parties' wholesale contracts were filed, FERC's Order in the proceedings confirms that they were not, and

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[6] As stated recently by the court of appeals for the District of Columbia Circuit, Section 205(d) "require[s] that utilities provide 60 days prior notice to the Federal Regulatory Energy Commission before a rate takes effect. FERC may waive that requirement, however, 'for good cause shown.'" *Xcel Energy Serv., Inc. v. FERC*, No. 06-1174, 2007 U.S. App. LEXIS 28882, at *3 (D.C. Cir. Dec. 14, 2007).

relies instead upon its determinations that sellers lacked market power:

> [R]espondents and Staff state that the ALJ correctly found that an initial review of the challenged contracts has already occurred under Section 205 when the Commission approved the WSPP Agreement, and after further proceedings, found that all Respondents are authorized to sell power at market-based rates and that they did not possess the ability to exercise market power. *Id.*, at 1239a.

Thus, the record below is devoid of any FERC order, made upon a showing of good cause, allowing changes to the sixty day advance filing requirement of FPA § 205(d).

FERC purports to grant utilities with market-based rates a blanket exemption from their statutory filing duties. In 2002, FERC directed sellers deemed to lack market power *not* to file their market rate contracts. *Revised Public Utility Filing Requirements*, 67 Fed. Reg. 31,043, 31,047-48, May 8, 2002 (*"Order 2001"*). In 2005, FERC adopted a regulation, stating that "any market-based rate agreement pursuant to a tariff shall not be filed with the Commission." 18 CFR § 35.1(g) (2005). In 2007, FERC reaffirmed that directive in a rulemaking proceeding. *Market-Based Rates For Wholesale Sales Of Electric Energy, Capacity And Ancillary Services By Public Utilities*, 119 F.E.R.C. ¶ 61,295, 2007 F.E.R.C. LEXIS 1297 at *190 (2007) (*"Order 697"*), stating "we will continue to direct

sellers not to file long-term market-based rate sales contracts, unless otherwise permitted by Commission rule or order." *Id.* The reason for the 2007 admonition to not file wholesale electricity contracts between affiliated entities was explained by FERC as follows:

> Although, *at one time, the Commission's policy was to require certain market-based rate sellers to file their long-term market-based rate power sales service agreements with the Commission,* since the issuance of Order No. 2001, the Commission's policy has been to require that such agreements not be filed with the Commission. Notwithstanding this policy, the Commission on occasion may have accepted long-term service agreements for filing. At this time, the Commission reaffirms that long-term affiliate sales contracts under the seller's market-based rate tariff that are authorized by the Commission shall not be filed with the Commission." Notice of Proposed Rulemaking, *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, 71 Fed. Reg. 33,102 at 33,118-18 (proposed May 19, 2006) (to be codified at 18 C.F.R. pt. 35) (emphasis added).

FERC has made a complete turnabout from its prior enforcement of filing requirements for market-based rate contracts since its orders in *Central Maine Power Co.*, 56 F.E.R.C. ¶ 61,200 (1991) *and Prior*

Notice and Filing Requirements Under Part II of the Federal Power Act, 64 F.E.R.C. ¶ 61,139 (1993) ("*Prior Notice and Filing*"). In those cases, the agency held that the FPA requires filing of all contracts, *especially* market rate contracts, and ordered plenary revision of unfiled contracts and resetting of rates, even for contracts that had been completed, all with *no* mention of any *Mobile-Sierra* problem.[7] FERC deals with this major "flip-flop" in statutory enforcement, made without intervening statutory change in utility filing obligations, by not mentioning it in this Court.

B. Unfiled Contract Rates Are Subject To Plenary FERC Review For Reasonableness

FERC's history and effort to defend its current market-based rate regime glosses over a period when FERC asserted plenary power to revise contract rates, including market-based rates, when the contracts were not properly filed before they took effect. The statutory contract filing requirement, its applicability

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[7] "Insisting that utilities file market-based rates, even if one favors maintaining the entrenched custom that prevailed for decades on cost-based rates, makes sense, for two reasons. Utilities needed to submit to the Commission market-based rates, which the FERC evaluated under ever-shifting standards, in order for the FERC to establish the boundaries of acceptable pricing for wholesale electric utilities engaging in jurisdictional transactions. Second, if utilities calculate a market price, they may collect exorbitant rates, if they failed to seek Commission approval. Therefore, failing to file market-based rates may amount in many instances to much more than a technical violation." Joshua Z. Rokach, *FERC's Jurisdiction Under Section 205 of the Federal Power Act*, 15 ENERGY L. J. 83, 89 (1994).

to market-based rates, and the remedies when an unfiled contract comes to light, were discussed more than a decade ago, when FERC expressed strong disapproval of non-compliance with FPA § 205(d) notice and filing requirements in *Central Maine.*[8] In these and other cases, FERC asserted plenary power to revise unfiled contract rates. In so ordering, FERC acknowledged the force of the statutory filing obligations:

> We do not look favorably upon utilities undertaking sales such as these in violation of the section 205 FPA requirement that a rate schedule be on file for any wholesale sale in interstate commerce. It is particularly troublesome in a case such as this, where nontraditional rates are being sought for a long-term power sale and our ability to effectively remedy the defect in the rates is restricted as a result of the sales taking place without Commission approval.
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> * * * *

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[8] Central Maine Power Co. came before the Commission seeking a waiver of § 205 notice and filing requirements with respect to 14 agreements for the sale of short-term capacity to various entities. Although some of the transactions had already terminated by the time of the FERC proceeding, this did not prevent subsequent review and revision of the charges to levels deemed reasonable by FERC.

> Such delay has occurred in instances where utilities have sought to justify their rates on a cost basis, as well as in instances where nontraditional (market-based) rates have been requested. Delay in tendering rate filings can place the Commission in a difficult position, regardless of whether the rates are cost- or market-based. *However, this problem is most acute when market-based rates are requested. Timing is critical in such cases. The Commission cannot cure a defective market or market process retroactively. Central Maine* at ¶ 61,818 (emphasis added).

After FERC announced its new refund policy for market-based rates in *Central Maine*, it decided *Central Hudson Gas & Electric Corp.*, 60 F.E.R.C. ¶ 61,106 (1992), *reh'g denied*, 61 F.E.R.C. ¶ 61,089 (1992), clarifying when it would grant a waiver of the FPA's prior notice filing requirements. Thereafter, FERC further enunciated the filing obligations of public utilities under the FPA, "to balance respect for the statutory requirement of prior notice and filing with the market realities of the public utilities." *Prior Notice and Filing* at ¶ 61,972.

Since the 1993 *Prior Notice and Filing* order, the relevant statutory prior rate and contract filing requirements of the FPA have not been changed by Congress. In 2002, after the contracts in this case were signed, FERC amended the prior filing requirements, stating that "[e]xecuted market-based

power sales agreements need not be filed." *Order 2001* at 31,044. Repeal of the regulatory requirement, of course, could not alter the longstanding statutory requirement for prior filing. The *Prior Notice and Filing* order demonstrates that remedies are available for the benefit of consumers, when utilities fail to file their contracts in accordance with the statute, in keeping with the primary purpose of the law — protection of utility consumers.[9]

The court of appeals for the District of Columbia circuit recently held that the *Mobile-Sierra* doctrine did not apply to unfiled interconnection contracts, citing the rationale of the 1993 *Prior Notice and Filing* order, and rejecting claims that *Mobile-Sierra* applied to contracts that had not been timely filed and for which specific waivers of the advance filing period had not been granted by FERC.[10] Also, a

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[9] *Pennsylvania Water & Power Co. v. FPC*, 343 U.S. 414, 418 (1952) ("A major purpose of the [Federal Power Act] is to protect power consumers against excessive prices"); *Electrical Dist. No. 1 v. FERC*, 774 F.2d 490, 492-493 (D.C. Cir. 1985) ("the provision must be read in light of the Federal Power Act's primary purpose of protecting the utility's customers").

[10] *Xcel Energy Serv.*, 2007 U.S. App. LEXIS 28882 (D.C. Cir. Dec. 14, 2007). "Xcel invokes the value of private contracts . . . and . . . reasons that FERC's refusal to grant waivers [of FPA 205 filing requirements] under such circumstances conflicts with precedents – FERC's, ours, and the Supreme Court's (the *Mobile-Sierra* doctrine. . .) – that favor enforcement of contractual commitments. Since Xcel could readily have filed all four disputed agreements . . . it seems far from arbitrary for the Commission to find that . . .

recent FERC ALJ decision illustrates that in other contexts involving similar filing requirements, sellers who do not file their contracts are at peril of plenary review and revision.[11] Unless and until Congress changes the law to their liking, "sophisticated" sellers such as Petitioners would be well advised to file their contracts under FPA § 205(d) and to insist that FERC treat their filings as such, rather than merely informational,[12] if they wish to obtain the degree of certainty afforded by *Mobile-Sierra*.

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the parties' [negotiations] were not extraordinary circumstances [justifying waiver]." *Id.* at 3.

[11] See *Am. W. Airlines, et al. v. SFPP, L.P. et al.*, 118 F.E.R.C. ¶ 63,033, 66,171 (2007). "SFPP elected at its peril not to file the Watson Station charges with the Commission. Instead, SFPP relied upon privately negotiated contracts. . . . The Commission is charged with ensuring that rates for interstate jurisdictional services are just and reasonable and these contracts cannot operate to frustrate the Commission's regulatory responsibilities under the [Interstate Commerce Act]." *Id.* at 118 F.E.R.C. ¶¶ 66,171-72 (citations omitted).

[12] *Amicus* Dynegy Power Marketing, Inc., a party to a companion case decided by the Ninth Circuit on the same day as the instant case, *Pub. Utils. Comm'n of Cal. v. FERC*, 474 F.3d 587 (9th Cir. 2006), asserts "[a]lthough FERC's regulations do not require sellers with market-based rate authorization to file their individual contracts, Dynegy took the additional step of submitting its CDWR contract to FERC. FERC put the contract out for comment . . . [and] accepted the contract for filing effective March 2001." *Brief of Amici Coral Power, L.L.C., et al.*, at 4. The California intervenors point out in their brief that FERC did not treat Dynegy's filing as an FPA § 205 filing. See, *Brief of Respondents Publ Util. Comm'n of Calif., et al.* at 39-40.

C. FERC'S Market Power Review Cannot Satisfy The Utilities' Statutory Duty To File Contracts

As discussed above, the *Mobile-Sierra* doctrine only comes into play when contracts have been filed in compliance with the FPA. FERC acknowledges that FPA § 205(d) requires all contracts to be filed sixty days in advance, and in its orders below it acknowledged that the contracts at issue were not filed. *Joint Appendix P* at 1239a. To finesse the absence of the filing predicate for *Mobile-Sierra* review, FERC claims that its prior market power review somehow "satisfies" the statutory prior filing duties of utilities. *FERC Brief* at 31. As a consequence of this fiction, FERC allows wholesale sellers of electricity to charge what the market will bear, without filing contracts and rates in advance, and then invokes the filed rate and *Mobile-Sierra* doctrines to insulate unfiled, unscrutinized, utility charges from meaningful review for reasonableness. The text of the FPA, however, gives no authority to FERC to completely eliminate prior public filing requirements when the agency believes a utility lacks market power.

FERC argues that it can eliminate the prior filing requirement under its power to designate the time and form of rate filing under FPA § 205(c),[13] that

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[13] "Although the FPA requires that every public utility file with FERC 'schedules showing all rates and charges for any

its regime of unfiled rates is judicially endorsed,[14] that its current regime was impliedly ratified by Congress,[15] and that advance filing and initial review of the disputed contracts would not have mattered. As we demonstrate below, FERC's contentions lack merit.

(i) FERC's Power To Modify The Filing Times Under Section 205(c) Cannot Justify Disregard Of FPA § 205(d) Which Requires Good Cause And A Specific Order Stating When The Rate Changes Will Occur

FERC acknowledges that FPA Section 205(d) requires prior filing of contracts, but nowhere does FERC discuss its specific, limiting language, which requires any change in the sixty day advance public filing requirement to be made "for good cause shown" and only "by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published."

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transmission or sale subject to the jurisdiction of the Commission,' 16 U.S.C. 824d(c), it explicitly leaves the timing and form of those filings to FERC's discretion." *FERC Brief* at 28.

[14] "[A]s the Ninth Circuit observed in *Lockyer*, 'so long as FERC has approved a tariff within the scope of its FPA authority, it has broad discretion to establish effective reporting requirements. . . .'" *Id.* at 28-29.

[15] "In all of these provisions, Congress has effectively ratified the Commission's previous position regarding its authority to approve a framework of market-based rates under FPA." *Id.* at 30 (internal quotations omitted).

Instead, FERC claims it can abrogate completely the sixty day advance filing requirement of § 824d(d), and its prerequisites for changes in filing times, under color of § 824d(c), which gives the agency general power to designate the time and form of filing of rate schedules and contracts. *FERC Brief* at 28.

FERC is making arguments very similar to those made by the Federal Communications Commission ("FCC") in its attempt to deregulate nondominant providers of telephone service in *MCI, supra.* There, the FCC asserted that a general power to "modify" tariff filing requirements gave it the power to abolish them altogether for providers deemed to be nondominant.[16] Here, FERC is in effect giving blanket exemption from the advance contract filing requirement to sellers it deems lack market power. This Court rejected the FCC's claim in *MCI*, stating:

> Bearing in mind, then, the enormous importance to the statutory scheme of the tariff-filing provision, we turn to whether what has occurred here can be considered a mere 'modification.' The Commission stresses that its detariffing policy applies only to nondominant carriers,. . . . *What*

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[16] *MCI* involved complete detariffing, while FERC requires sellers to file a "market-based rate tariff" which simply says rates will be set by seller and buyer, and is devoid of any schedules of rates and charges. The result is the same – rates are not actually filed.

> *we have here, in reality, is a fundamental revision of the statute, changing it from a scheme of rate regulation to a scheme of rate regulation only where effective competition does not exist.* That may be a good idea, but it was not the idea Congress enacted into law. . . ." *MCI*, 512 U.S. at 231-32.

In sum, in analogous circumstances, this Court held that only Congress can provide the filing exemption FERC purports to grant to sellers deemed to lack market power.

(ii) This Court Has Not Approved FERC's Administrative Negation of Statutory Filing Requirements

The next justification proffered by FERC is that its market-based rate regime has been judicially approved.[17] A close examination reveals this to be a weak claim at best. First, FERC fails to cite or address this Court's decisions holding that regulatory agencies lack power to alter filing requirements of filed rate regulation statutes, *e.g.*, *MCI*. Instead, FERC cites cases that lend some support to its effort to rely partially on market forces. This is unremarkable, and

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[17] FERC states that "[t]he courts have held that '[i]n competitive markets, FERC may rely upon market based prices in lieu of cost-of-service regulation to assure a just and reasonable result.'" *FERC Brief* at 6.

is within the broad scope of permissible rate making methodologies, so long as FERC does not *exclusively* rely on market forces to set rates, *FPC v. Texaco, Inc.*, 417 U.S. 380 (1974), assures that all rates and charges are reasonable, and enforces statutory filing obligations. *MCI,* 512 U.S. at 234.

The lower court cases cited by FERC, with one exception discussed below, did not decide whether FERC could substitute its market power review for the utility's statutory duty to file rates. In the case that is the judicial fount of much of market rate doctrine, *Elizabethtown Gas Co. v. FERC,* 10 F.3d 866 (D.C. Cir. 1993),[18] the court of appeals expressly avoided the question whether the market rate system in that case ran afoul of rate filing requirements of the NGA similar to FPA 205d(d).[19] And, in the case that

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[18] In a more recent phase of the same case, the circuit court said "[G]enerating a dozen orders from FERC and now a third opinion from this court, Transco's struggle to change its rate structure has demonstrated the Dickensian potential of energy regulation disputes . . ." *Exxon Mobil Corp. v. FERC,* 430 F.3d 1166, 1168 (D.C. Cir. 2005).

[19] "[P]etitioners . . . conten[d] that the Restructuring Settlement is inconsistent with the various reporting requirements of the [Natural Gas Act] . . . (*requiring pipelines to file rate schedules and give advance notice of rate changes*). This contention appears nowhere in the petitioners' original brief and they cite no reference to it in their various pleadings before FERC. *Accordingly. . . we do not reach this contention.*" *Elizabethtown Gas,* 10 F.3d 866, 871 (citation omitted) (emphasis added).

imported the *Elizabethtown Gas* doctrine into wholesale electricity rates, *Louisiana Energy and Power Authority v. FERC* ("*LEPA*"), 141 F.3d 364 (D.C. Cir. 1998), the court of appeals noted that no party had challenged FERC's claim of power to allow market rates. *Id.* at n. 2. Moreover, at the time of the decision in *LEPA*, FERC's 1993 *Prior Notice and Filing* order was still in effect, and as previously discussed, it required prior filing by sellers of all their contracts for wholesale electricity, including those with market rates.

FERC cites the Ninth Circuit's *Lockyer* decision in support of its system of unfiled rates. That decision is hardly binding on this Court. The Ninth Circuit said FERC's system of prior market power assessment and subsequent reporting of sales is sufficient to satisfy the statutory filing requirements, *Lockyer*, 383 F.3d at 1013, but relief was nonetheless granted, over FERC's opposition, on the ground that the sellers failed to file the subsequent reports deemed by the court to be essential to FERC's alternative scheme. *Lockyer* did not discuss the language of FPA § 205(d) constraining deviations from the sixty day filing period. When sellers petitioned this Court for review of *Lockyer*, the State of California continued to press its point that unreasonable rates could be modified, without clashing with filed rate doctrines, because the sellers in that case also had failed to comply with the prior filing

requirements of the FPA.[20] This issue was left unresolved when the Court denied certiorari in *Lockyer*. Thus, the Ninth's Circuit's *Lockyer* decision is not binding or persuasive as a rationale for avoiding the filed contract predicate for invocation of the *Mobile-Sierra* doctrine.

(iii) Congress Did Not Ratify FERC's Unfiled Market Rate Regime Because Amendments That Mention Markets Or Market Rates Are Not Necessarily In Conflict With The Filing Requirements

Perhaps signaling desperation, FERC claims Congress retroactively ratified its market rate regime in the Energy Policy Act of 2005 ("EPAct 2005").[21] Congress, however, did not repeal or modify either the longstanding requirements of 16 U.S.C. § 824d(d) regarding the utility duty to file contracts, or the prerequisites for agency modification of the sixty day

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[20] "The filed rate doctrine does not apply here, however, because petitioners did not file their rates. . . . Because rates were not — and could not have been — properly filed under any theory, the filed rate doctrine does not pose a bar to refund claims in this case." Cross-Petitioner State of California Conditional Cross-Petition for Writ of Certiorari, No. 06-888, at 2 (Feb. 5, 2007).

[21] FERC claims that "[h]ad there been any doubt about the validity of market-based rates, it should have been dispelled by the enactment of [EPAct 2005]. Several provisions of that statute are premised on the existence of the market-based rate system and are aimed at enhacing that system and ensuring its smooth functioning." *FERC Brief* at 29.

prior filing period on a case-specific basis for good cause shown. FERC is essentially arguing that longstanding statutory language requiring filing has been impliedly repealed for sellers deemed to lack market power. That exception is not in the text of the statute, and cannot be read into it by implication.

Implied repeal occurs only if the "provisions in the two acts are in irreconcilable conflict" or if "the later act covers the whole subject of the earlier one and is clearly intended as a substitute." *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936). "[W]hen two statutes are capable of co-existence, it is the duty of the courts ... to regard each as effective.' " *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976), *quoting Morton v. Mancari*, 417 U.S. 535, 551 (1974).

FERC claims that in some new statutory snippets, "Congress has effectively ratified the Commission's previous position regarding its authority to approve a framework of market-based rates under the FPA." *FERC Brief* at 30 (internal quotations omitted). But in its 1993 *Prior Notice and Filing* order, FERC itself took the position that the existing language statutorily required market rate contracts to be filed. Nothing Congress did in EPAct 2005 mentioning markets or market rates is inconsistent with *filing* market rate contracts as the plain language of FPA § 205(d) still requires.

The meaning of § 205(d) is established by its plain language, as definitively construed in prior

decisions of this Court, and cannot be changed to jibe with the current fashion at FERC except by direct repeal or explicit modification demonstrating a new intent of Congress to jettison the filed rate regulation paradigm.

In sum, the new language Congress added to the FPA in 2005 referring to markets is harmonious with the longstanding rate filing requirement. Repeal by implication in such a situation is impermissible. *United States v. Burroughs*, 289 U. S. 159, 164 (1933) ("[I]f effect can reasonably be given to both statutes, the presumption is that the earlier is intended to remain in force.").

(iv) Efforts To Trivialize The Filing Prerequisite Should Be Rejected

FERC and Petitioners attempt to impeach this Court's findings in *Mobile-Sierra* by citing to portions of the underlying administrative record in those cases to claim that the contract rates had not really been reviewed and approved by the agency.[22] What matters today, however, is that the Court believed the contracts had been properly filed publicly, in advance, *subject to review for reasonableness*, in compliance with the governing statutes, and this was essential to the outcome.

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[22] See, e.g., *FERC Brief* at 33, *Brief of Petitioner Morgan Stanley* at 24, *Brief of Petitioner Calpine, et al.* at 39-40.

Moreover, it cannot be assumed that advance public filing would not have inhibited sellers from extracting excessive prices, would not have drawn objections from intervenors, would not have resulted in meaningful FERC review and revision of the contract rates, or would not have resulted in greater FERC accountability for the results of its market rate experiments. As stated in *BP West Coast Products, LLC v. FERC*, 374 F.3d 1263 (D.C.Cir. 2004):

> [T]he Commission may not grandfather unfiled rates on the assumption that if the rates had been filed, no challenge would have been brought. The Commission may not regulate rates as if they existed in a world that never was. It must take the rates as it finds them, and here, FERC found them unfiled. If FERC interprets Section 1803 to apply only to filed rates, then *it may not extend the benefits of that provision to unfiled rates based on speculation about what would have happened had they in fact been filed.* *Id.*at 1274 (emphasis added).

Accordingly, the Court should reject the efforts of FERC and the Petitioners to trivialize the core statutory filing requirements on the grounds that FERC might not have reacted if the contracts been filed.

II. CHANGES SOUGHT BY PETITIONERS AND FERC MUST BE MADE BY CONGRESS

There is no reason for this Court to alter its definitive statutory construction in the *Mobile-Sierra* cases, which applies only when the contracts are filed in advance in accordance with the governing statute. It is basic that under the FPA, contracts must be filed "to insure that regulated companies charge only those rates of which the agency has made cognizant." *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577-78 (1981). If FERC and the Petitioners wish to amend this longstanding filing system, to achieve a greater degree of certainty for unfiled contracts never filed and never subject to scrutiny by the public or FERC before they take effect, they must first seek and obtain such fundamental amendments to the law from Congress. As this Court stated more than thirty years ago in the context of efforts by FERC's predecessor to rely on market results:

> It is not the Court's role . . . to overturn congressional assumptions embedded into the framework of regulation established by the Act. This is a proper task for the Legislature where the public interest may be considered from the multifaceted points of view of the representational process. *FPC v. Texaco*, 417 U.S. 380, 400 (1974).

The wisdom of such judicial restraint is illustrated by the aftermath of this Court's decision in *MCI*, where the Court refused to legitimize the FCC's

administrative gutting of the statutory filed rate regulation framework. Congress promptly developed a new, albeit imperfect, statutory paradigm, in the Telecommunications Act of 1996 (the "Telecom Act"). P.L. No. 104-104, 110 Stat. 56 (1996). In the context of permitting deregulation of some services, Congress established criteria in the Telecom Act for the agency to follow. Congress also adopted new universal service and protective measures for low income consumers throughout the nation (including Lifeline), required fair treatment of rural consumers, required expanded deployment of telecommunications services to schools and libraries, and required the FCC to implement these measures.[23] These enhancements were not or could not have been adopted by the agency acting on its own to erase statutory duties of utilities intended to protect consumers.

In the aftermath of Enron and other calamities arising under FERC's energy deregulation, Congress may have little appetite for eliminating FERC's power to revise market rate contracts, as FERC and the Petitioners urge the Court to do. Or, as suggested by *Texaco* and the aftermath of *MCI*, Congress may adopt a new scheme with new consumer protections that would take into account the new breed of electric utilities that has emerged in recent years.

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[23] 47 U.S.C. § 254(b)(3) (universal service provisions), (b)(6) (schools and libraries), (i) (universal service consumer protections), and (j) (Lifeline).

CONCLUSION

The *Mobile-Sierra* doctrine is simply inapplicable because the contracts in this case were not filed in compliance with FPA § 205(d). The order of the Ninth Circuit should be affirmed, because it corrects the failure of FERC to protect utility customers from the effects of unreasonable wholesale charges.

FERC's claim that the statutory advance filing requirement is satisfied by its blanket determination that sellers lack market power is unsupported by the text of the statute and is contrary to the decisions of this Court requiring regulatory agencies to reconcile any initiatives to rely on competition and market forces with the necessity of continued compliance with existing filed rate regulation statutes. FERC and the Petitioners must obtain Congressional authorization for deregulation initiatives that dispense with transparent advance public filing of rates and agency

accountability to the public and to consumers for reasonableness of all charges.

Respectfully submitted,

Gerald A. Norlander*
Geraldine Gauthier
Louis Manuta
PUBLIC UTILITY LAW PROJECT
OF NEW YORK, INC.
194 State Street, Suite 420
Albany, NY 12210
Tel. (518) 449-3375
* *Counsel of Record for Public Utility Law Project of New York, Inc.*

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